Splended Wave Sdn Bhd & Anor v Song Hwa Sub & Ors

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22–87/7 OF 2013
CHEW SOO HO J
8 JANUARY 2014

Civil Procedure — Injunction — Interim injunction — Principles for granting interim injunction — American Cynamid principles — Application for injunction to prevent transfer of land from being registered — Whether bona fide serious issues to be tried shown — Whether compensation not an adequate remedy — Whether land special commodity — Whether plaintiff's business would be disrupted — Balance of convenience — Whether undertaking as to damages a prerequisite

The first plaintiff was engaged in the business of resort and hotel operation on three plots of lands in Sabah ('the said land'). The second plaintiff held the said land for the benefit of the first plaintiff. The second plaintiff had granted the first plaintiff a 30 year sublease of the said land which had been duly registered. The said land was held under Native Title. The first and second defendants were former directors of the first plaintiff. After first and second defendants had resigned from the first plaintiff as directors, the new directors of the first plaintiff discovered that the first and second defendants had wrongfully instructed and/or fraudulently misrepresented to the second plaintiff being the registered proprietor of the said land that the first plaintiff wanted to transfer the said land to the third defendant resulting in the second plaintiff signing several documents including the memorandum of transfer ('MOT') to transfer the said land in favour of the third defendant without any consideration. It was also found that first and/or second defendant had wrongfully and without authority surrendered the sublease granted by the second plaintiff to the first plaintiff. The first and/or second defendant had caused the original title deed to the said land to be handed to the third defendant for the purpose of the said transfer and surrender of the sublease. The plaintiffs thus brought the present suit seeking interim injunction to, inter alia, restrain the defendants from registering the purported MOT from the second plaintiff to the third defendant and from dealing with the said land.

Held, allowing the application with costs in the cause:

(1) The law and guiding principles on interim injunction have been well enunciated in *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 which have been adopted and constantly applied in our courts as follows: (a) whether the plaintiff's claim against the defendant on the facts discloses a bona fide serious issue to be tried. The court at this

interlocutory stage, is not required to determine the merits of the claim or the rights of the parties; (b) the court must then proceed to consider where the justice of the case lies whether the harm would be greater in granting the injunction or by its refusal and arrive at a finding which party would suffer greater injustice. In this respect, if the court finds that damages would be an adequate remedy, injunction should not be granted; and (c) the court must consider where the balance of convenience or the balance of justice of the case lies by weighing one need against another. If all relevant factors are evenly balanced, the status quo should be maintained (see para 12).

(2) On the totality of the evidence before the court, there were several serious issues which merited trial and they were bona fide issues. Therefore the first legal requirement of whether there were bona fide serious issues to be tried had been duly satisfied (see para 18).

(3) Referring to the second requirement under *American Cyanamid*, land is a special commodity which once lost may not be adequately compensated by damages for the loss. Further, the first plaintiff's resort and hotel was located on the said land. If the said land was transferred to the hand of a third party, this may directly disrupt the business operation of the first plaintiff. Looking in the light of business efficacy, the loss of the said land may not be adequately compensated as the first plaintiff, without the said land, would probably be unable to carry on with its usual resort and hotel business. Therefore, compensation may not be the adequate remedy (see para 19).

(4) On the balance of convenience, balancing all factors, justice would be better served if the said land was placed on its status quo without any further dealings on it by any party until the trial of the suit finally determined all the triable issues and the rights of the parties. Greater injustice would be occasioned to the plaintiff if dealing on the said land was not restrained as the said land was an integrated parcel of land with the other two adjacent lands which housed the resort and hotel business of the first plaintiff. Balance of convenience ought therefore to tilt in favour of the plaintiffs (see para 20).

(5) An undertaking as to damages by the party seeking injunction is a prerequisite for the grant of an interlocutory injunction. The plaintiffs had given that undertaking to pay damages to the second and third defendants for any loss arising from the interlocutory injunction should plaintiffs fail in their claims. There was no issue raised as to the ability and capability of the plaintiffs to fulfill their undertaking to pay damages (see para 21).

(6) Balancing the convenience of the first plaintiff and the second and third defendants, an interlocutory injunction was just and equitable to refrain

the said land being the subject matter in dispute from being transferred until the final disposal of this suit (see para 22).

[Bahasa Malaysia summary

Plaintif pertama telah melibatkan diri dalam perniagaan operasi resort dan hotel di atas tiga plot tanah di Sabah ('tanah tersebut'). Plaintif kedua memegang tanah tersebut untuk faedah plaintif pertama. Plaintif kedua telah memberikan plaintif pertama pajakan kecil selama 30 tahun ke atas tanah tersebut yang mana telah didaftarkan. Tanah tersebut dipegang di bawah hakmilik anak negeri. Defendan pertama dan kedua adalah pengarah terdahulu plaintif pertama. Selepas defendan pertama dan kedua telah meletakkan jawatan daripada plaintif pertama sebagai pengarah, pengarah baru plaintif pertama mendapati bahawa defendan pertama dan kedua telah secara salah mengarahkan dan/atau secara fraud menyatakan kepada plaintif kedua yang merupakan pemilik berdaftar tanah tersebut bahawa plaintif pertama hendak memindahkan tanah tersebut kepada defendan ketiga yang mengakibatkan plaintif kedua menandatangani beberapa dokumen termasuk memorandum pindah milik ('MPM') untuk memindahkan tanah tersebut bagi pihak defendan ketiga tanpa apa-apa balasan. Ia juga didapati bahawa defendan pertama dan/atau defendan kedua telah secara salah dan tanpa autoriti menyerahkan sub-pajakan yang diberikan oleh plaintif kedua kepada plaintif pertama. Defendan pertama dan/defendan kedua telah menyebabkan surat ikatan hakmilik tanah tersebut diberikan kepada defendan ketiga bagi tujuan pindah milik dan penyerahan pajakan kecil. Plaintif oleh itu membawa guaman ini memohon injunksi interim untuk, antara lain, menahan defendan-defendan daripada mendaftarkan MPM yang dikatakan daripada plaintif kedua kepada defendan ketiga dan daripada berurusan dengan tanah tersebut.

Diputuskan, membenarkan permohonan dengan kos dalam kausa:

(1) Undang-undang dan prinsip pada injunksi interim telah juga dinyatakan dengan jelas dalam *Amerika Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 yang telah diterima pakai dan sentiasa digunakan dalam mahkamah kita seperti berikut: (a) sama ada tuntutan plaintif terhadap defendan pada fakta mendedahkan satu isu bona fide yang serius untuk dibicarakan. Mahkamah di peringkat interlokutori, tidak dikehendaki untuk menentukan merit tuntutan atau hak pihak-pihak; (b) mahkamah kemudian hendaklah terus menimbangkan mana keadilan kes itu terletak sama ada kemudaratan itu akan menjadi lebih besar dalam memberikan injunksi itu atau oleh keengganannya itu dan membuat suatu dapatan yang mana pihak akan mengalami ketidakadilan yang lebih besar. Dalam hal ini, jika mahkamah mendapati bahawa ganti rugi akan menjadi remedi yang mencukupi, injunksi tidak boleh diberikan; dan (c) mahkamah perlu mengambil kira di mana imbangan kemudahan

atau imbangan keadilan berpihak dengan menimbang satu keperluan terhadap yang lain. Jika semua faktor-faktor yang berkaitan sama rata seimbang, status quo perlu dikekalkan (lihat perenggan 12).

(2) Pada keseluruhan keterangan di hadapan mahkamah, terdapat beberapa isu serius yang mana bermerit untuk dibicarakan dan mereka adalah isu bona fide. Oleh itu kehendak undang-undang yang pertama sama ada terdapat isu bona fide yang serius untuk dibicarakan telah pun dipenuhi (lihat perenggan 18).

(3) Merujuk kepada keperluan di bawah *American Cyanamid*, tanah adalah komoditi istimewa yang mana sekali hilang mungkin tidak boleh dipampas secukupnya oleh ganti rugi untuk kerugian tersebut. Selanjutnya, resort dan hotel plaintif pertama terletak di tanah tersebut. Jika tanah tersebut dipindahkan kepada pihak ketiga, ini akan secara langsung mengganggu operasi perniagaan plaintif pertama. Melihat kepada kecekapan perniagaan, kerugian terhadap tanah tersebut tidak mungkin akan dipampas secukupnya, kerana plaintif pertama, tanpa tanah tersebut, mungkin tidak akan boleh untuk menjalankan perniagaan resort dan hotelnya seperti biasa. Oleh itu, pampasan mungkin tidak menjadi remedi yang mencukupi (lihat perenggan 19).

(4) Pada imbangan kemudahan, mengimbangi semua faktor, keadilan akan lebih baik dilaksanakan jika tanah tersebut telah diletakkan pada status quo tanpa apa-apa urusan lagi di atasnya oleh mana-mana pihak sehingga perbicaraan saman itu akhirnya memutuskan semua isu-isu yang boleh dibicarakan dan hak-hak pihak-pihak. Ketidakadilan yang lebih besar akan berlaku kepada plaintif jika urusan atas tanah tersebut tidak dihalang kerana tanah tersebut adalah petak bersepadu tanah dengan dua tanah bersebelahan yang menempatkan resort dan hotel perniagaan plaintif pertama. Imbangan kemudahan itu sepatutnya dibuat memihak kepada plaintif (lihat perenggan 20).

(5) Suatu akujanji berkenaan ganti rugi oleh pihak yang memohon injunksi adalah prasyarat untuk suatu pemberian injunksi interlokutori. Plaintif telah memberikan akujanji tersebut untuk membayar ganti rugi kepada defendan kedua dan ketiga bagi apa-apa kerugian yang timbul daripada injunksi interlokutori sekiranya plaintif gagal dalam tuntutan mereka. Tidak ada isu yang ditimbulkan tentang kebolehan dan kemampuan plaintif untuk memenuhi akujanji mereka untuk membayar ganti rugi (lihat perenggan 21).

(6) Membuat imbangan kemudahan terhadap plaintif pertama dan defendan kedua dan ketiga, suatu injunksi interlokutari adalah adil dan berekuiti untuk menghalang tanah tersebut menjadi perkara subjek dalam pertikaian daripada dipindahkan sehingga saman ini selesai (lihat perenggan 22).]

Notes

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3817–3943.

Cases referred to

Allen and Others v Jambo Holdings Ltd and Others [1980] 2 All ER 502, CA (folld)
American Cynamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (folld)
J J Harrison (Properties) Ltd v Harrison [2001] All ER (D) 160, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 MLJ 293 ; [1995] 3 CLJ 293, CA (refd)
Kuching Waterfront Development Sdn Bhd v Superintendent of Lands & Surveys, Kuching Division & Ors [2008] MLJU 758 ; [2008] 10 CLJ 231, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 ; [1995] 1 CLJ 609, CA (refd)
Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1) [2002] 6 MLJ 361, HC (refd)

Legislation referred to

Companies Act 1965 s 132C
Rules of Court 2012 O 29 r 1, O 92 r 4
Sabah Land Ordinance (Cap 68) s 17(1)

Celestina S Galid (Jayakah & Co) for the plaintiffs.
Ariel Christopher Dasan (MG's Legal Chambers) for the defendants.

Chew Soo Ho J:

INTRODUCTION

[1] In this application vide encl 2, the plaintiffs are seeking the order of court pursuant to O 29 r 1 and O 92 r 4 of the Rules of Court 2012, inter alia, that:

(a) the defendants, their servants and/or agents be restrained from registering and/or causing the registration of the purported memorandum of transfer ('MOT') of the land held under NT 023229281 ('the said land') from the second plaintiff to the third defendant;

(b) the defendants, their servants and/or agents be restrained from entering into any dealings including but not limited to selling and/or transferring the said land to any third party(s) pending the disposal of this action;

(c) the defendants, their servants and/or agents be restrained from registering and/or causing the registration of the purported surrender of sublease over the said land; and

(d) costs.

[2] The principal grounds in seeking the aforesaid injunction are, inter alia, that the first and second defendant had wrongfully instructed and/or fraudulently misrepresented to the second plaintiff being the registered proprietor of the said land that the first plaintiff wanted to transfer the said land to the third defendant resulting in the second plaintiff signing several documents including the MOT to transfer the said land in favour of and to the third defendant without any consideration; that the first and/or second defendant had wrongfully and without authority surrendered the sublease granted by the second plaintiff to the first plaintiff; that the first and/or second defendant had caused the original title deed to the said land to be handed to the third defendant for the purpose of the said transfer and surrender of the sublease; that the first and second defendant in causing the said land to be transferred to the third defendant without the prior approval of the first plaintiff had contravened s 132C of the Companies Act 1965 and that first and second defendant had thereby committed fraud, breach of fiduciary duty and/or breach of trust against the first plaintiff; and that the defendants will possibly proceed to register the MOT and surrender of sublease unless restrained by this court.

[3] The second and third defendants are opposing this application. Respective affidavits have been filed by the parties followed by their respective written submissions and reply.

BRIEF FACTS

[4] The first plaintiff is engaged in the business of resort and hotel operation known as Starnis Resort in the locality of Kg Melinsung, Papar, Sabah, comprising three adjacent lands held under CL 02544736, CL 025359960 and NT 023229281 ('the said land'). It is alleged that the second plaintiff held the said land and CL 025359960 for the benefit of the first plaintiff. In addition, the second plaintiff had granted the first plaintiff a 30 year sublease of the said land and the land held under CL 025359960 which had been duly registered. The said land is held under native title which the first plaintiff intended to convert to a country lease title as it had successfully done so for NT 02313945 which became CL 025359960. All these lands were recorded as the assets of the first plaintiff and they are with a market value as at 7 February 2013 to be RM8.2m.

[5] The first defendant, as at 3 January 2013, held two shares in the first plaintiff's total issued shares of 7,792,796 shares. A Korean company, DS Networks Co Ltd held the remaining number of shares. The first defendant was also a director in the first plaintiff at all material time until 3 January 2013 when he ceased to be one.

[6] The second defendant was from 16 November 2008–2 January 2013 a director of the first plaintiff. The second defendant is also a shareholder of Kota-Korea Sdn Bhd with the third defendant and the first defendant who held initially 40% of the shares but had on 24 December 2012 transferred them to the first plaintiff. The third defendant was a shareholder of Kota-Korea Sdn Bhd and its director until 7 March 2013 when he was removed. Until 7 February 2013, the defendants and one Huh Myung Hwan were at all material times the directors of the board of directors of Kota-Korea Sdn Bhd. The second and third defendant were removed as directors on 7 February 2013 while the first defendant resigned on 8 February 2013. After first and second defendant had resigned from the first plaintiff as directors, the new directors of the first plaintiff discovered the alleged MOT and surrender of sublease in respect of the said land from a bill of a legal firm. It was then learned from the second plaintiff that sometime in October 2012, the first and/or the second defendant had instructed and/or misrepresented to the second plaintiff that the first plaintiff wanted to transfer the said land to the third defendant and to surrender the sublease. Thereafter, the first and third defendant brought the second plaintiff to a legal firm where the second plaintiff was allegedly instructed by the first defendant to sign documents including the MOT in favour of the third defendant. The original title of the said land was also handed over to the third defendant who deposited it with the legal firm for the said transfer and surrender of the sublease. Premised on the MOT dated 10 January 2013, third defendant had lodged a caveat on the said land on 28 February 2013. The plaintiffs alleged that no consideration was paid for the purported transfer of the said land. It was found that both the first and second defendant had not obtained any approval of the first plaintiff for the transfer of the said land to the third defendant nor any approval to surrender the sublease in breach of s 132C of the Companies Act 1965.

[7] On 28 January 2013, the first plaintiff had caused a caveat to be entered on the said land relying on the sublease as its interest in the said land. Although the third defendant attempted to remove the first plaintiff's caveat, the district officer did not proceed with the hearing scheduled on 12 June 2013 when being informed that the first plaintiff was unaware of the third defendant's application and/or the hearing of that application.

[8] The plaintiffs contended that the first and second defendants have committed fraud, breach of fiduciary duty and/or breach of trust against the

first plaintiff and hence this suit against the defendants was filed and this application (encl 2) for injunction to allegedly safeguard the said land from being further dealt with by the defendants, their servants and/or agents.

[9] There is no affidavit in opposition from the first defendant who remained unserved. The second defendant's contention in a nutshell shows that the first defendant was the principal director representing the first plaintiff at all material time and was in charge of the sale of Starnis Hotel & Resort for which the second defendant averred that consideration of RM8m was paid to the first plaintiff after 30 November 2011 as a consequence of a share transfer agreement dated 30 August 2011 executed by the second defendant on behalf of Kota-Korea Sdn Bhd and an asset acquisition agreement between the first plaintiff and Kota-Korea Sdn Bhd dated 3 September 2011 wherein Kota-Korea Sdn Bhd acquired all assets both tangible and intangible of the first plaintiff. Hence, with the consideration having been paid, the first plaintiff would have no claim and/or interest over any of the properties comprised in Starnis Resort. On the allegation of fraud, breach of fiduciary duty and/or breach of trust against the first plaintiff, the second defendant contended that since the second plaintiff had admitted executing the MOT of the said land at the second defendant's solicitor's office, there was no such fraud, breach of fiduciary duty and/or breach of trust.

[10] The third defendant contended, inter alia, that the first plaintiff is a non-native and the second plaintiff holding the said land under native title for the first plaintiff is illegal under s 17(1) of the Sabah Land Ordinance (Cap 68) and thus, the first plaintiff's dealings with the said land are prohibited under the Sabah Land Ordinance as the said land is a native title for which only the natives can deal with the said land. It was averred that there is no fraud, breach of fiduciary duty and/or breach of trust against the first plaintiff as the second plaintiff admitted executing the MOT of the said land at the third defendant's solicitor's office. The third defendant denied the market value of the said land to be RM8.2m and affirmed that the first and second defendant had instructed the second plaintiff to transfer the said land to the third defendant because of his dedication and commitment and financial support to Kota-Korea Sdn Bhd when it was in financial difficulties.

[11] The plaintiffs had denied any consideration for the alleged MOT of the said land.

EVALUATION AND FINDINGS

[12] The law and guiding principles on interim injunction have been well enunciated in *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 which have been adopted and constantly applied in our courts and they are as follows:

(a) whether the plaintiff's claim against the defendant on the facts before the court discloses a bona fide serious issue to be tried. The court at this interlocutory stage, is not required to determine the merits of the claim or the rights of the parties;

(b) the court must then proceed to consider where the justice of the case lies whether the harm would be greater in granting the injunction or by its refusal and arrive at a finding which party would suffer greater injustice. In this respect, if the court finds that damages would be an adequate remedy, injunction should not be granted; and

(c) the court must consider where the balance of convenience or the balance of justice of the case lies by weighing one need against another. If all relevant factors are evenly balanced, the status quo should be maintained.

See also *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

[13] On the prime consideration of whether there is or are bona fide serious issues to be tried, the plaintiffs' claim against the defendants', in particular, against the first and second defendant as pleaded shows that first and second defendant who were allegedly acting in their capacity as directors of the first plaintiff and/or Kota-Korea Sdn Bhd in which the first plaintiff was a substantial shareholder, had committed fraud, breach of fiduciary duty or breach of trust against the first plaintiff when they allegedly instructed or fraudulently misrepresented to the second plaintiff who was the registered owner of the said land and who had granted a 30 years sublease to the first plaintiff, that the first plaintiff had intended to transfer the said land and surrender the sublease to or in favour of the third defendant thereby resulting in the second plaintiff executing documents inclusive of the MOT of the said land and the surrendering of the original title in favour of and to the third defendant. The plaintiffs' allegation and contention are that the first and second defendant had not obtained the approval and or consent of the first plaintiff before they acted to transfer the said land which is a substantial part of the assets of the first plaintiff to a third party ie the third defendant and there was no consideration for such transfer. The defendants had not shown by evidence that they had obtained any approval or consent from the first plaintiff vide a resolution of the first plaintiff in general meeting but averred that the second plaintiff had duly executed the said MOT for the transfer of the said land to the third defendant. In other words, they are saying indirectly that the second plaintiff had voluntarily and/or willingly executed the MOT and perhaps, by that, there is no necessity for the approval of the first plaintiff in general meeting. In this respect, s 132C of the Companies Act 1965 as relied on by the plaintiff is relevant to be considered whether this raises a bona fide serious issue to be tried. Section 132C provides:

A 132C (1) Notwithstanding anything in a company's memorandum of articles, the directors shall not carry into effect any proposal or execute any transaction for —

(a) ...

(b) the disposal of a substantial portion of the company's undertaking or property,

B which would materially and adversely affect the performance or financial position of the company unless the proposal or transaction has been approved by the company in general meeting.

C **[14]** The first defendant was the director of the first plaintiff and appeared to be the key person in the management and/or operation of the first plaintiff. He ought to have knowledge whether the said land and the sublease were the substantial portion of the assets of the first plaintiff and if it is true that he played the role as alleged by the plaintiffs particularly by the second plaintiff D that he/first defendant had instructed and/or fraudulently misrepresented to the second plaintiff into parting the said land and the sublease of the first plaintiff without any approval or consent in general meeting, whether first defendant's acts may contravene s 132C Companies Act 1965 and may E constitute a breach of fiduciary duty or breach of trust against the first plaintiff as contended by the plaintiffs, to this court, is a bona fide serious issue to be tried; see the cited case of *J J Harrison (Properties) Ltd v Harrison* [2001] All ER (D) 160.

F **[15]** The second defendant had admitted vide his affidavit in opposition that he had executed the share transfer agreement and the subsequent asset acquisition agreement between the first plaintiff and Kota-Korea Sdn Bhd which appeared to be the basis for the alleged transfer of the first plaintiff's alleged portion of assets. Whether such acts of the second defendant constitute G a breach of s 132C of the Companies Act 1965 and a breach of fiduciary duty or breach of trust is also a bona fide triable issue.

[16] Defence of the second and third defendant contended on the issue of illegality relating to the said land held under native title that the first plaintiff H not being a native would not be permitted to deal with such land pursuant to the Sabah Land Ordinance. This is an issue where both the plaintiffs and the defendants are at variance and I find that such issue can only be properly inquired into and determined at the trial of the suit.

I **[17]** On the question of consideration for the alleged transfer of the said land to the third defendant, the plaintiffs contended no consideration was made for the alleged transfer whereas second defendant contended a sum of RM8m had been paid to the first plaintiff as consideration while the third defendant deposed in his affidavit in opposition that the said land was transferred to him

'due to my dedication and commitment and financial support to Kota-Korea Sdn Bhd when it was in financial difficulties' without affirming that a sum of RM8m was paid to the first plaintiff as consideration for the said transfer of the said land. I find that this issue of consideration merits further inquiry into on the facts and evidence in the trial in order that the court can arrive at a just determination whether consideration was in actual fact provided for the alleged transfer of the said land. I find this to be also a bona fide issue for the trial proper.

[18] On the totality of the evidence before this court, it is amply clear that there are several serious issues which merit trial and they are bona fide issues. Therefore I hold that the first legal requirement of whether there are bona fide serious issues to be tried to have been duly satisfied.

[19] Referring to the second requirement under *American Cyanamid* of whether damages are adequate remedy to satisfy principally the plaintiffs' claims, I agree with the submission by the plaintiffs that land is a special commodity which once lost may not be adequately compensated by damages for the loss citing cases of *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 MLJ 293; [1995] 3 CLJ 293; *Kuching Waterfront Development Sdn Bhd v Superintendent of Lands & Surveys, Kuching Division & Ors* [2008] MLJU 758; [2008] 10 CLJ 231. In the instant case, the first plaintiff's principal business is the operation of resort and hotel known as Starnis Resort and this business is located on the said land with two other adjacent lands as stated above. If the said land is being transferred to the hand of a third party, this may directly disrupt the business operation of the first plaintiff as the new owner may take possession of the said land or any other actions on the said land. Looking in the light of business efficacy, the loss of the said land may not be adequately compensated as the first plaintiff, without the said land, would probably be unable to carry on with its usual resort and hotel business as before. This loss may also cause the loss of business to the first plaintiff. Therefore, I find that compensation may not be the adequate remedy.

[20] On the balance of convenience, with the facts and evidence before this court, I am of the view that balancing all factors herein, justice would be better served if the said land is placed on its status quo without any further dealings on it by any party until the trial of this suit has finally determined all the triable issues and the rights of the parties as raised and contended by the parties herein. Greater injustice will occassion to the plaintiff if dealing on the said land is not restrained as the said land is an integrated parcel of land with the other two adjacent lands which housed the resort and hotel business of the first plaintiff. Balance of convenience ought therefore to tilt in favour of the plaintiffs.

[21] An undertaking as to damages by the party seeking injunction is a

pre-requisite for the grant of an interlocutory injunction (*American Cynamid*'s case at p 510). The plaintiffs herein have given that undertaking to pay damages to the second and third defendant for any loss arising from the interlocutory injunction should the plaintiffs fail in their claims. This does not seem to have been challenged by the second and third defendant vide their affidavits. However, in submission, the second and third defendant queried the ability and capability of the plaintiffs to satisfy any claim for damages by the second and third defendant by referring to the financial statement of the first plaintiff which indicated that the first plaintiff was running at a loss in its business. The plaintiffs objected strongly on this aspect of the defendant's submission which does not come from any affidavit evidence but tantamounts to evidence from the bar by learned counsel for the second and third defendant. From the affidavits sworn by the second and third defendant, I must agree that there is no issue raised as to the ability and capability of the plaintiffs to fulfill their undertaking to pay damages. If the second and third defendant wished to challenge the plaintiffs' ability and capability of paying damages, they must pen down their challenge as evidence which would render an opportunity for the plaintiffs to adduce evidence to rebut the challenge. In the absence of such evidence in the second and third defendant's affidavit, giving evidence from the bar through submission by counsel is deprecated; see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609. In the case of *Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1)* [2002] 6 MLJ 361 at pp 408–409, Abdul Malik Ishak J (as His Lordship then was) after referring to numerous authorities, inter alia, the case of *Allen and Others v Jambo Holdings Ltd and Others* [1980] 2 All ER 502 cited the words of Lord Denning MR at p 505 on the ability of a poor plaintiff to satisfy her undertaking in damages as follows:

> It is said whenever a mareva injunction is granted, the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw LJ said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas the rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.

[22] Although the *Allen*'s case involves a mareva injunction, I am of the view that the undertaking in damages is similar and would thus be equally applicable in interlocutory injunction for which an undertaking for damages is a pre-requisite. The court should not deprive a plaintiff of an interlocutory injunction merely because he has limited financial resources. What the court needs to do is to balance the justice of the case of one side against the other to determine what is just and equitable and not merely on account of the poverty

or the richness of the plaintiffs. Balancing the convenience of the first plaintiff and the second and third defendant in this respect, I find that interlocutory injunction is just and equitable to refrain the said land being the subject matter in dispute from being transferred until the final disposal of this suit.

[23] For the foregoing reasons, I allow encl 2 with costs in the cause.

Application allowed with costs in the cause.

Reported by Kanesh Sundrum